



Signed: December 28, 2010

EDWARD D. JELLEN
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re
STEVEN ON AND
IVY HO ON,

Case No. 10-47541 EDJ
Chapter 7

Debtors.

MEMORANDUM DECISION - DEBTORS' MOTION TO DISMISS

Steven On and Ivy Ho On, the above debtors (hereinafter, the "debtors"), have moved for dismissal of this chapter 7 case. The motion is opposed by Paul Mansdorf, trustee in bankruptcy ("Mansdorf").

The debtors ground their motion on what they allege is their own willful failure to comply timely with their duty under Bankruptcy Code § 521(e)(2)(A) to supply Mansdorf with a copy of their year 2009 tax return. In essence, the debtors contend that, because they elected not to comply with that duty, Bankruptcy Code § 521(e)(2)(B), quoted *infra*, deprives the court of discretion to deny their motion. Therefore, contend the debtors, the court must dismiss their case, even if dismissal would not otherwise be

Memorandum Decision

1 warranted under the applicable statutory and case law governing
2 dismissal of chapter 7 cases.

3 On December 21, 2010, the court entered its order denying the
4 debtors' motion.

5 A. Background

6 The debtors filed a voluntary chapter 7 petition herein on July
7 1, 2010. The meeting of creditors mandated by Bankruptcy Code
8 § 341(a)¹ was initially set for August 11, 2010. The setting of the
9 meeting of creditors on this date triggered a duty on the part of
10 the debtors under § 521(e)(2)(A)² to supply Mansdorf with copies of
11 their year 2009 tax return on or before August 4, 2010, seven days
12 prior to the meeting of creditors. The debtors supplied Mansdorf
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14 ¹All further section references herein are to the Bankruptcy
15 Code, 11 U.S.C. § 101 et seq.

16 ²Section § 521(e)(2)(A) provides:

17 (A) The debtor shall provide--

18 (i) not later than 7 days before the date first set for the
19 first meeting of creditors, to the trustee a copy of the
20 Federal income tax return required under applicable law (or
21 at the election of the debtor, a transcript of such return)
22 for the most recent tax year ending immediately before the
23 commencement of the case and for which a Federal income tax
24 return was filed; and

25 (ii) at the same time the debtor complies with clause (i), a
26 copy of such return (or if elected under clause (i), such
transcript) to any creditor that timely requests such copy.

1 with a copy of the tax return, at, but not seven days prior to, the
2 meeting of creditors.

3 In his opposition to the debtors' motion to dismiss, Mansdorf
4 argues that dismissal would not be in the best interest of creditors
5 and the estate, alleging that the debtors have failed to schedule
6 significant assets such as bank accounts, that they wrongfully
7 transferred property of the estate to their children after the
8 filing of the petition, that they have claimed exemptions to which
9 they are not entitled, and that the estate has assets that could be
10 distributed to creditors.

11 B. Discussion

12 Section 707(a) provides, in relevant part, that a court may
13 dismiss a case under chapter 7 "only for cause." Thus, a debtor
14 does not have an absolute right of dismissal. In re Bartee, 317
15 B.R. 362, 366 (9th Cir. BAP 2004); In Re Leach, 130 B.R. 855, 857
16 (9th Cir. BAP 1991).

17 A debtor is generally not entitled to an order of dismissal if
18 such dismissal would result in legal prejudice to creditors.
19 Bartee, 317 B.R. at 366; Leach, 130 B.R. at 857. "Debtors bear the
20 burden of establishing that dismissal would not prejudice their
21 creditors." Bartee, 317 B.R. at 366.

22 The Ninth Circuit Bankruptcy Appellate Panel has held that
23 dismissal, when assets are available to pay something to unsecured
24 creditors, would be prejudicial to creditors such as to preclude the
25 granting of a debtor's motion to dismiss. Id.

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1 Here, assets are available for distribution to creditors.
2 Moreover, Mansdorf believes that he may be able to enhance such
3 distribution depending on the outcome of his further investigation
4 as to the allowability of the debtors' disputed claims of exemption,
5 and any future proceedings regarding the undisclosed assets and
6 unauthorized post-petition transfers of estate property that
7 Mansdorf alleges.

8 Suffice it to say that cutting off Mansdorf's ability to
9 investigate the foregoing matters and to pursue any action to
10 recover assets in connection therewith, while denying the estate of
11 the benefit of its assets now on hand, would clearly be prejudicial
12 to creditors.

13 Moreover, if the debtors' schedules and statements are
14 materially inaccurate, as Mansdorf alleges, such would provide a
15 separate and independent ground for denial of the debtors' motion to
16 dismiss. Bartee, 317 B.R. 366-67. As the Bartee court stated:

17 A debtor who has invoked the protection of the Bankruptcy
18 Code must also assume the responsibilities attendant to
19 this protection, including accounting for assets and
20 completing schedules in good faith, and . . . the debtor
may not engage in questionable or fraudulent conduct and
then dismiss the case once such conduct is discovered.

21 Id. (internal citations omitted).

22 The debtors cite no law to the contrary. Rather, their primary
23 argument boils down to their contention that, under the facts of
24 this bankruptcy case, § 707(a) and the jurisprudence thereunder is
25 rendered irrelevant by § 521(e)(2)(B), which provides as follows:

1 If the debtor fails to comply with clause (i) or (ii) of
2 subparagraph (A), the court shall dismiss the case unless the
3 debtor demonstrates that the failure to so comply is due to
circumstances beyond the control of the debtor.

4 Thus, the debtors' argument is that they failed to provide copies of
5 their tax return to Mansdorf on a timely basis, that such failure to
6 comply was not due to circumstances beyond their control, and thus,
7 that "the court shall dismiss" language mandates that their motion
8 to dismiss be granted.

9 This argument fails for many reasons. In the first place, the
10 court entered an order on August 6, 2010 providing that if the
11 debtors did not provide Mansdorf with the required tax documents
12 within 14 days from the date of the order, their case may be
13 dismissed. This operated to extend the time for the debtors to
14 avoid dismissal by complying no later than August 20, 2010. They
15 did so comply, and thus, § 521(e)(2)(B) was not triggered.

16 More significantly, § 521(e)(2)(B) does not trump § 707(a) when
17 a debtor's motion to dismiss is at issue. Section 707 is the
18 Bankruptcy Code provision that specifically governs dismissal of
19 chapter 7 cases. Section 521 is the Bankruptcy Code section that
20 governs a debtor's duties under the Bankruptcy Code, and provides
21 for dismissal in some cases if the debtor does not comply.

22 But when a debtor, rather than a trustee or creditor, is
23 seeking dismissal, § 707 and not § 521 is the governing provision.
24 "It is an elementary tenet of statutory construction that '[w]here
25 there is no clear intention otherwise, a specific statute will not
26 be controlled or nullified by a general one'" Guidry v.

1 Sheet Metal Workers Nat. Pen. Fund, 493 U.S. 365, 375, 110 S.Ct.
2 680, 687 (1990) quoting Morton v. Mancari, 417 U.S. 535, 550-51, 94
3 S.Ct. 2474, 2482-83 (1974).

4 In this regard, it is worth noting that in the instance where
5 Congress did, in fact, intend for § 521 to trump § 707, i.e., in
6 § 521(i)(1),³ it expressly so provided, whereas no such exception
7 appears in § 521(e)(2).

8 In addition, in construing §§ 707 and 521, it is appropriate
9 for the court to note that

10 It is a maxim of equity adjudication that 'no one can take
11 advantage of his own wrong;' and the Bankruptcy Court is a
12 court of equity. To permit one to profit by his own
13 wrongdoing is to extend an open invitation to wrongdoing.
14 Equity abhors such conduct.

15 In re Fuller Cleaning & Dyeing Co., 118 Fed.2d 978, 979 (6th Cir.
16 1941). Or, as the Ninth Circuit Bankruptcy Appellate Panel stated:

17 [T]here is an important interest related to the integrity
18 of the bankruptcy system. When a debtor's choice to
19 commence a chapter 7 case backfires, a debtor is not
20 entitled to escape by awarding himself a dismissal either
21 by declining to perform his statutory duties or by
22 recanting he commitment to have debtor-creditor relations
23 adjusted in equitable proceedings.

24 ³Section 521(i)(1) provides:

25 Subject to paragraphs (2) and (4) and notwithstanding
26 section 707(a), if an individual debtor in a voluntary
case under chapter 7 or 13 fails to file all of the
information required under subsection (a)(1) within 45
days after the date of the filing of the petition, the
case shall be automatically dismissed effective on the
46th day after the date of the filing of the petition.

1 In re Hickman, 384 B.R. 832, 842 (9th Cir. BAP 2008).

2 The court is aware of the decision in In re Norton, 347 B.R.
3 291 (Bankr. E.D. Tenn. 2006), cited by the debtors, which held that
4 a bankruptcy court has no discretion to extend the time for a debtor
5 to comply with § 521(e)(2)(B) on request of a trustee in bankruptcy,
6 and ordering a debtor that had failed to comply timely to show cause
7 why her bankruptcy case should not be dismissed.

8 This court declines to follow Norton. In Norton, the debtor
9 was not seeking dismissal; rather, the trustee was seeking an
10 extension of time. Moreover, Norton, to the extent applicable here,
11 conflicts with most of the other reported decisions relevant to the
12 question, such as In re Duffus, 339 B.R. 746, 748 (Bankr. D. Or.
13 2006), In re Grasso, 341 B.R. 821 (Bankr. D. N.H. 2006), and In re
14 Ring, 341 B.R. 387 (Bankr. D. Me. 2006).

15 It also conflicts with the reasoning of the Ninth Circuit's
16 decision in In re Warren, 568 F.3d 1113 (9th Cir. 2009). In Warren,
17 a bankruptcy court had denied a debtor's motion to dismiss a chapter
18 7 case after the trustee had discovered assets. The debtor sought
19 to use her own failure to comply with § 521(i)(1)'s 45-day deadline
20 to provide the information required by § 521(a)(1) as grounds for
21 the motion, arguing that § 521(i)(1) provides that a case "shall be
22 automatically dismissed effective on the 46th day" if the debtor
23 fails to file timely the information required by § 521(a)(1).

24 The bankruptcy declined to grant the debtor's motion to
25 dismiss, notwithstanding the "automatically dismissed" language, and
26 the debtor appealed. The district court reversed. The Ninth

1 Circuit, however, reversed the district court, noting that a
2 contrary construction of § 521(a)(1) and 521(i)(1) would be
3 inconsistent with the Congressional intent of § 521, preventing
4 debtor abuse. Warren, 568 F.3d at 1118. The Ninth Circuit also
5 noted that, in enacting § 521, Congress never intended to strip the
6 bankruptcy court of the flexibility it needs to "respond
7 intelligently to a debtor who is attempting to manipulate the system
8 simply because the forty-five day deadline has passed." Id. at 1119
9 (internal citations omitted).

10 C. Conclusion

11 For the foregoing reasons, the court has issued its order
12 denying the debtors' motion to dismiss this chapter 7 case.

13 *** END OF ORDER ***
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